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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/552,623	10/07/2005	Jack Burger	7392/84445	9138
43798 7590 04/15/2009 FITCH, EVEN, TABIN & FLANNERY P. O. BOX 18415 WASHINGTON, DC 20036				
EXAMINER				
DEES, NIKKI H				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
04/15/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/552,623

Applicant(s)

BURGER ET AL.

Examiner

Nikki H. Dees

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 January 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) 15 and 22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 and 16-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-8508)
- Paper No(s)/Mail Date 07 October 2005
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date _____
- 5) ☐ Notice of Inventor's Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of Group I, claims 1-14 and 16-21, in the reply filed on January 21, 2009, is acknowledged. The traversal is on the ground(s) that the claims do not lack unity of invention. This is not found persuasive because Applicants argue that the International Bureau did not note the lack of unity of invention. This is a separate prosecution from the International Bureau and the restriction is deemed proper for the reasons set forth in the requirements for restriction mailed December 17, 2008.

The requirement is still deemed proper and is therefore made FINAL.

In the abstract, it is noted that the word "oxygen" in the title is misspelled.

Appropriate correction is requested.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 4, 5, 16 and 21 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. Claim 4 claims 1-30 wt % of a sweetener. Claim 4 is dependent on claim 1, which claims 5 to 30% mono-, di-, and trisaccharides. One of ordinary skill would

recognize that mono-, di- and trisaccharides are commonly used as sweeteners. It is unclear if claim 4 is limiting the mono-, di-, and trisaccharides of claim 1, or claiming sweeteners in addition to the mono-, di-, and trisaccharides of claim 1. If claim 4 is to limit claim 1, it is noted that the range claimed for the sweeteners in claim 4 is broader than that range claimed for the mono-, di-, and trisaccharides of claim 1.

5. Claim 5 further is unclear as it is dependent on claim 4 and claims "100 wt. % of the mono-, di-, and trisaccharide material is a sweetener." It is unclear if applicant is referring to the mono-, di-, and trisaccharides of claim 1 or the sweeteners of claim 4.

6. For purposes of examination, claims 4 and 5 will be considered to limit the mono-, di-, and trisaccharides of claim 1, where the mono-, di-, and trisaccharides are present in the matrix in an amount ranging from 5 to 30 wt% and comprise 100 wt% of the sweeteners of claim 5.

7. Claim 16 is rejected as being dependent on a withdrawn claim. For purposes of examination, claim 16 will be interpreted as being dependent on claim 1. It will be interpreted to claim a product comprising the oxygen stable composition of claim 1.

8. Claim 21 claims a product that is "essentially sugar-free." It is unclear how much sugar the product may, or may not, contain in order to be considered "essentially sugar-free." Claim 21 is dependent on claim 17 to a "sugar confectionary article." It is unclear how this confectionary article is to be essentially sugar free. As the product of claim 21 comprises the composition of the instant invention in combination with foodstuffs, and the instant invention comprises mono-, di-, and trisaccharides, a product that is

"essentially sugar-free" will be considered to be a product that does contains little or no sucrose in addition to the composition of the instant invention.

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 1-13 and 16-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burger et al. (WO 02/47492) in view of Menzi et al. (US 6,056,949).

11. Regarding claims 1 and 2, Burger et al. teach a composition comprising inert core particles coated with at least one active compound encapsulated in a carbohydrate matrix, where the matrix comprises 45-70 wt % high molecular weight film form carbohydrates, 5-30 wt % mono-, di-, and trisaccharides, and 10-30 wt % maltodextrin (claim 1).

12. Regarding claim 3, the film forming carbohydrate may be selected from the group consisting of gum arabic, gum acacia, lipophillically modified starches and mixtures thereof (claim 3).

13. Regarding claims 4 and 5, the composition of Burger et al. may comprise xylitol in an amount ranging from 5 to 30 wt % of the total composition and the xylitol may be 100% of the sweetener (p. 4 lines 30-33).

14. Regarding claims 6 and 7, active compounds encapsulated in the invention of Burger et al. include flavourants, fragrances, pharmaceuticals and wash-active compounds (claim 9). Many active flavor and fragrance compounds are taught for use in the invention, specifically including linalool (pp. 5-6, lines 24-33, lines 1-17).
15. Regarding claim 8, the active compound is present in the invention of Burger et al. at 1-40 wt % (claim 11).
16. Regarding claim 9, the core particles of the invention of Burger et al. include tea fannings, tea dust, tobacco particles, sugar crystals, and plant seeds (claim 12).
17. Regarding claims 11 and 12, the composition of Burger et al. has core particles in the size ranging from 0.1-3 mm (claim 13). The ratio of core particles to coating ranges from 5:1 to 1:5 (claim 14).
18. Regarding claims 16-21, Burger et al. teach the encapsulation of flavors and fragrances and claim products comprising their composition (claim 18).
19. Burger et al. are silent as to the particles being further coated with a modified cellulose having reversible gel formation properties upon temperature increase and the weight ratio of this coating (claims 1 and 13). They are also silent as to the particles being coated with an additional lipid coating (claim 10).
20. Menzi et al. teach the coating of flavoring particles with substances known to be used to provide a protective skin or film, including modified cellulose and fat (col. 2 lines 40-48).
21. Regarding claim 11, Example 3 teaches a molten vegetable fat at 50-60°C, indicating the melting point is at least 30°C and the layer is at least 50 wt% lipids.

22. As active-containing particles are known in the prior art, as is the additional coating of fats and film forming modified cellulose, one of ordinary skill in the art at the time the invention was made wishing to improve the stability of the particles of the invention of Burger et al. would have found it obvious to provide the particles with an additional coating layer or layers in order to protect the particles. This additional coating layer would not have required undue experimentation, and there would have been a reasonable expectation that the additional coating layer would have provided additional protection against oxidation. One of ordinary skill would further have been able to modify the thickness of the modified cellulose layer as desired in order to provide a suitable protective layer without diminishing the activity of the flavorant or active being encapsulated.

23. Regarding claims 16-20, it would have been obvious to include the flavor particles of Burger et al. in any foodstuff requiring the desired flavor. Foodstuff where flavors are known to be added including confectionary articles, chewing gums, dry soups, sausages, snacks, and noodles. Additionally, the determination of the amount of flavor particles to be added is well within the abilities of one of ordinary skill without undue experimentation.

24. Regarding claim 21, the substitution of non-carbohydrate sweeteners for sucrose and other carbohydrate sweeteners is common throughout the food industry. The replacement of carbohydrate sweeteners with non-carbohydrate sweeteners to provide "sweet" products with reduced caloric content would have been obvious to one of ordinary skill in the art.

25. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Burger et al. (WO 02/47492) in view of Menzi et al. (US 6,056,949) as applied to claim 1 above and in further view of Yolles (3,857,964).
26. The combination of Burger et al. and Menzi et al. teaches an oxygen stable composition having a modified cellulose coating as required by claim 1.
27. The combination is silent as to the type of modified cellulose to be used for the coating.
28. Yolles teaches modified cellulose coatings including hydroxypropyl cellulose and methyl cellulose to be used as an outer coating on flavor particles (col. 4 lines 4-9).
29. It would have been obvious to one of ordinary skill in the art the time the invention was made to have selected known, commercially available modified cellulose coatings, as taught by Yolles, to use for coating particles where a modified cellulose coating was desired. The use of modified cellulose coatings, including hydroxypropyl cellulose and methyl cellulose, as outer coatings was known in the art at the time the invention was made, and undue experimentation would not have been required to employ these particular types of coatings in the combination of Burger et al. and Menzi et al.

Double Patenting

30. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory

obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

31. Claims 1-3, 6-9, 11, and 12 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4 and 8-13 of U.S. Patent No. 7,018,651 in view of Menzi et al. (US 6,056,949). USPN 7,018,651 teaches an oxygen stable composition comprising inert core particles coated with active compounds encapsulated in a carbohydrate matrix. Limitations claimed for the composition of the carbohydrate matrix, inert core particles, active ingredients significantly overlap with those of the instant application. USPN 7,018,651 is silent as to an additional coating with a modified cellulose having reversible gel forming properties. Menzi et al. teach the coating of granulated particles with modified cellulose in order to provide the granules with an additional protective layer or protective skin (col. 2 lines 40-44). One of ordinary skill wishing to provide the granules of USPN 7,018,651 with additional protection from oxidation would have found it obvious to coat the particles with an outer layer of modified cellulose as modified cellulose was known in the art as to be used as an outer protective layer, as taught by Menzi et al.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nikki H. Dees whose telephone number is (571) 270-3435. The examiner can normally be reached on Monday-Friday 7:30-5:00 EST (second Friday off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nikki H. Dees/
Examiner, Art Unit 1794
/Lien T Tran/
Primary Examiner, Art Unit 1794

Nikki H. Dees
Examiner
Art Unit 1794

